FILED
FEB 20 2007
SUPREME COURT

(7)

No. 06-341

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S BRIEF ON THE MERITS

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS HAUER & FELD LLP
ROBERT S. STRAUSS BUILDING
1333 HAMPSHIRE AVENUE, NW
WASHINGTON, D.C. 20036
(202) 887-4060

Co-Counsel for Petitioner

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
T. HAROLD PINKLEY
DAVID L. JOHNSON
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
(615) 244-9270

Counsel for Petitioner

February 20, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision undisputedly harbored no discriminatory motive toward the affected employee.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are set forth in the case caption. The corporate disclosure statement contained in the Petition for Writ of Certiorari, Pet. App. iii, remains accurate. *See* SUP. CT. R. 24.1(b), 29.6.

TABLE OF CONTENTS

Question Presented for Review i

Parties to the Proceeding and Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Jurisdictional Statement 1

Statutory Provisions Involved 1

Statement of the Case 2

I. UNDISPUTED MATERIAL FACTS 3

II. DECISIONS BELOW 12

Summary of the Argument 14

Argument 19

I. BECAUSE TITLE VII APPLIES TO THE CONDUCT OF EMPLOYEES WITH ACTUAL DECISIONMAKING AUTHORITY, BCI MAY NOT BE LIABLE MERELY BECAUSE GRADO MAY HAVE INFLUENCED PETERS'S TERMINATION 21

A. An Employer May Be Liable where an Agent, with Either Formal Authority or Practical Power to Make a Decision, Takes an Adverse Employment Action Against an Employee on the Basis of a Protected Trait 21

B. The EEOC Cannot Demonstrate That Grado Was the Actual Decisionmaker Responsible for Peters's Termination 24

II. BCI ALSO FULLY COMPLIED WITH TITLE VII BECAUSE EEOC DOES NOT ALLEGE THAT BCI WAS NEGLIGENT AND DID NOT SHOW THAT GRADO'S CONDUCT CAUSED PETERS'S TERMINATION 28

A. The EEOC Cannot Make Out a Claim That BCI Made Insufficient Efforts to Identify and Investigate Claims of Bias by Employees Such as Grado 33

B. Grado's Conduct Did Not Cause Peters's Termination 34

III. THE TENTH CIRCUIT'S MORE EXPANSIVE THEORY OF LIABILITY LACKS MERIT . . . 40

A. The Tenth Circuit's Decision Misapplies Supreme Court Precedent to Expand an Employer's Vicarious Liability Beyond the Bounds Necessary to Serve the Purposes of Title VII 40

B. The Tenth Circuit's Standard of Liability Overburdens Employers 43

C. The Tenth Circuit's Standard is Not Necessary to Prevent Employers from Remaining Willfully Blind to the Discriminatory Actions of Their Subordinates 47

D. BCI Prevails Even Under the Tenth Circuit's Expansive Standard Because the Record Does not Suggest that Edgar's Decisionmaking was Tainted by Discrimination 48

Conclusion 49

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 30

Bender v. Hecht's Dep't Stores,
455 F.3d 612 (C.A.6 2006) 46

Bullington v. United Air Lines, Inc.,
186 F.3d 1301 (C.A.10 1999) 26

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) . . . . . *passim*

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) . . . . . *passim*

Ford Motor Co. v. EEOC,
458 U.S. 219 (1982) 32

Hill v. Lockheed Martin Logistics Mgmt., Inc.,
354 F.3d 277 (C.A.4 2004) . . . . . *passim*

Holcomb v. Powell,
433 F.3d 889 (C.A.D.C. 2006) 46

Kariotis v. Navistar Int'l Transp. Corp.,
131 F.3d 672 (C.A.7 1997) 26

Kolstad v. Am. Dental Ass'n,
527 U.S. 526 (1999) . . . . . *passim*

Llampallas v. Mini-Circuits, Lab, Inc.,
163 F.3d 1236 (C.A.11 1998) 20, 23, 29

Long v. Eastfield Coll.,
88 F.3d 300 (C.A.5 1996) 23

Mahar v. StoneWood Transp.,
2003 ME 63, 823 A.2d 540 (Me. 2003) 41

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 30

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) . . . . . *passim*

Millbrook v. IBP, Inc.,
280 F.3d 1169 (C.A.7 2002), *cert. denied*,
537 U.S. 884 (2002) 46

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 26

Penn. State Police v. Suders,
542 U.S. 129 (2004) 31

Pippin v. Burlington Res. Oil & Gas Co.,
440 F.3d 1186 (C.A.10 2006) 46

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) . . . . . *passim*

Russell v. McKinney Hosp. Venture,
235 F.3d 219 (C.A.5 2000) 24

Santiago-Ramos v. Centennial P.R. Wireless Corp.,
217 F.3d 46 (C.A.1 2000) 24, 25

Shager v. Upjohn Co.,
913 F.2d 398 (C.A.7 1990) . . . . . *passim*

Stallings v. Hussmann Corp.,
447 F.3d 1041 (C.A.8 2006) 46

Willis v. Marion County Auditor's Office,
118 F.3d 542 (C.A.7 1997) 29

Acts:

Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716,
78 Stat. 241, 253-66 (1964) (Title VII) 1

Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78
Stat. 253-54 (1964) 1, 2

Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1),
78 Stat. 241, 255 (1964) 21

Statutes:

15 U.S.C. § 260a 10

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e(b) . . . . . *passim*

42 U.S.C. § 2000e-2(a) 1, 2, 19

ARIZ. REV. STAT. ANN. § 1-242 10

Restatements:

RESTATEMENT (SECOND) OF AGENCY
§ 219(2)(d) (1957) 40, 41

RESTATEMENT (THIRD) OF AGENCY
§ 2.04 (2006) 19, 21

RESTATEMENT (THIRD) OF AGENCY
§ 7.03 (2006) . . . . . *passim*

RESTATEMENT (THIRD) OF AGENCY
§ 7.05 (2006) 20, 28, 42

RESTATEMENT (THIRD) OF AGENCY
§ 7.08 (2006) 42

Rules:

SUP. CT. R. 24.1(b) iii

SUP. CT. R. 29.6 iii

Miscellaneous:

Brief for the United States and the EEOC as Amici Curiae, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) 22, 23

Daniel M. Combs, Casenote, Costos v. Coconut Island Corp.: *Creating a Vicarious Liability Catchall Under the Aided-By-Agency-Relation Theory*, 73 U. COLO. L. REV. 1099 (2002) 40

Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*
104 W. VA. L. REV. 517 (2002) 41

C. MCCORMICK, LAW OF DAMAGES (1935) 31, 32

WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY (1964) 40, 41

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, Pet. App. 1a-31a, is published at 450 F.3d 476. The unpublished memorandum opinion and order of the United States District Court for the District of New Mexico, Pet. App. 32a-76a, is unofficially reported at 2004 WL 3426757.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 7, 2006. Pet. App. 1a. This Court has jurisdiction to review this judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, as codified ("Title VII"), provides, in relevant part, as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

Section 701(b) of Title VII, as codified and amended, provides, in relevant part, as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more

> employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

42 U.S.C. § 2000e(b).

STATEMENT OF THE CASE

The petitioner, BCI Coca-Cola Bottling Company of Los Angeles ("BCI"), terminated an African-American employee, Stephen Peters ("Peters"), for insubordination. Peters, who was employed at BCI's facility in Albuquerque, New Mexico, refused a direct order from his Hispanic supervisor, Cesar Grado ("Grado"), to come to work. The Equal Employment Opportunity Commission ("EEOC") claims that BCI's reason for terminating Peters is pretextual and that Peters was actually terminated because of his race. It is undisputed that the individual who made the decision to terminate Peters, BCI Employee Relations Manager Patricia Edgar ("Edgar"), harbored no discriminatory bias toward Peters; indeed, Edgar did not even know Peters was African-American when she made the termination decision. Pet. App. 9a. The EEOC nonetheless sued BCI, alleging that Grado was biased toward African Americans and that his bias somehow influenced Edgar's decision to terminate Peters. Prior to this litigation, BCI had never received any complaints about Grado's alleged racial bias. JA 49.

Title VII of the Civil Rights Act of 1964, as codified and amended, makes it unlawful for an "employer," including its "agent," 42 U.S.C. § 2000e(b), to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1). Although Title VII includes

provisions authorizing courts to award damages (including punitive damages in certain cases), the purpose of this statute is not to remedy discrimination after the fact through litigation. Rather, Congress's overriding goal was to stop discriminatory practices in advance by encouraging employers "to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). It now falls to this Court, keeping these essential principles underlying Title VII in mind, to decide under what circumstances an employer may be liable based on a subordinate's discriminatory bias, where the person who actually made the adverse employment decision undisputedly harbored no discriminatory animus toward the affected employee. Applying its standard, the Court must also determine whether the EEOC has made the required showing in this case to survive BCI's motion for summary judgment.

I. UNDISPUTED MATERIAL FACTS.

1. BCI, a bottler of Coca-Cola® products, has adopted a comprehensive system of policies and procedures to detect and deter workplace discrimination. JA 24–27. BCI provides these policies and procedures to every employee. *Id.* BCI requires that all management employees be trained under those policies and instructed with respect to equal employment opportunity issues, such as affirmative action, workplace diversity, and the anti-discrimination provisions of Title VII. JA 24–25. Grado received such training, conducted by Edgar. JA 24–25, 35.

BCI's written Equal Employment Opportunity Policy prohibits discrimination based on race and provides that "[e]very employee has a responsibility to contribute to a positive work atmosphere, which reflects our non-discrimination policies." JA 26–27. BCI expressly requires every employee to "report incidents of harassment or

discrimination" to the company, which has a professional Human Resources Department responsible for addressing such issues. *Id.* Employees are provided the direct number to reach the Vice President of Human Resources. *Id.*

BCI also maintains a centralized investigative and decisionmaking system for addressing complaints about employee misconduct, which is designed to ensure consistent enforcement of BCI's personnel policies and to guard against discrimination. Under this system, BCI's supervisors monitor the employees working under their supervision, and when an employee has an attendance, performance, or disciplinary problem, the issue is brought to the attention of the Human Resources Department. JA 18, 31, 45, 86–88. A Human Resources representative, not a supervisor, determines whether a workplace policy applies to the situation and orders appropriate action. JA 18, 45, 83–84, 86–88.

To ensure that the company acts consistently and lawfully in addressing allegations of employee misconduct, BCI's Human Resources personnel consult written policies setting forth workplace rules and regulations, which are divided into three categories according to the severity of the infraction. JA 45, 50–61. Insubordination, classified by BCI in the most serious category of violations, does not encompass a situation in which an employee merely has failed to show up for work, failed to meet performance expectations, or failed to follow a supervisor's instructions. JA 20, 45, 50–51. Under BCI policy, insubordination occurs when an employee is told, or demonstrates that he knows, that he is considered to be defying a direct order from his supervisor and that his conduct could lead to termination. JA 20, 86–88. A single instance of insubordination is sufficient to result in immediate discharge. JA 45. Only a specially authorized Human Resources representative, however, can order a sanction as serious as termination. JA 18, 45, 84.

It is undisputed that under BCI's centralized decisionmaking system, Grado, as a district sales manager, had no authority to discipline or terminate employees working under his supervision. JA 31, 86–88, 91. The top-ranking BCI Human Resources representative at the Albuquerque facility during the relevant period was Senior Human Resources Administrator Sherry Pedersen. JA 45. BCI supervisors such as Grado brought issues regarding employee discipline to the attention of Pedersen, who had authority to make decisions regarding all disciplinary actions short of termination. JA 31, 33, 45. All termination decisions, however, required approval by an even higher level of authority: namely, Pedersen's supervisor, Edgar, who was located in Phoenix. JA 18, 45, 84.

2. Peters worked as a "merchandiser" with responsibility to deliver Coca-Cola® products to accounts such as grocery stores, to place and rotate the product, to clean and arrange display areas, and to place promotional materials. JA 29–30. Peters was one of six merchandisers working under Grado's supervision. *Id.* Grado was responsible for scheduling merchandisers for all accounts in his territory. JA 30, 98. Merchandisers worked five days each week with two days off; because accounts had to be serviced seven days per week, none of the merchandisers shared the same off-day schedule. JA 30. All merchandisers regularly were required to work on their scheduled days off in order to provide extra coverage for routes during particularly busy times or when other employees were absent. *Id.*

Because of his seniority, Peters was the only merchandiser who had Saturday and Sunday (the most preferred off-days) as his regularly scheduled days off. JA 30–31. Although Peters was occasionally called upon to work on his scheduled days off, he typically was required to do so less often than his

fellow merchandisers.[1] Unlike some of his Hispanic coworkers, Peters was never written up by Grado for performance issues, and in fact Peters received a service award while working under Grado's supervision. JA 35, 105.

3. Grado needed extra coverage for the weekend of Saturday, September 29 and Sunday September 30, 2001, because three of the chain stores in his area were running a special promotion requiring delivery of additional product. JA 31–32. Grado therefore asked one of his account managers, Jeff Katt, to tell Peters that he needed him to work on one of his days off that weekend. JA 32, 100. Katt spoke with Peters, who told Katt he could not work that weekend because he "had plans." JA 101. On Friday, September 28, 2001, Katt told Grado that he believed Peters would be unwilling to work on his days off during the upcoming weekend. JA 31, 32, 100–01. It is Grado's recollection that Katt also told him he believed that if Peters were asked to work, he would call in sick. JA 32. Although this last aspect of the communications between Katt and Grado is disputed—Peters denies ever telling Katt that he would call in sick—this dispute is immaterial. JA 107.

On Friday, September 28, one of the other merchandisers who typically covered Peters's routes on Peters's scheduled days off suffered a shoulder injury and was taken off work. JA 32. Because the remaining merchandisers were already scheduled to work that weekend, Grado was now a person short and had no one left to bring in except Peters. JA 31–32, 38–41. Given Katt's statements that Peters was likely to resist coming in on his day off, and because Grado was unsure whether he had the authority to require an employee

---

[1] For instance, during the first nine months of 2001, Peters worked on his scheduled days off fewer times than three of the Hispanic merchandisers and one of the white merchandisers reporting to Grado. JA 30, 31, 38–41.

to work on a scheduled day off, Grado sought advice from BCI's Human Resources Department. JA 33.

Ordinarily, Grado would have spoken with Pedersen regarding the situation, but as she was out of the office, he called Edgar, in Phoenix. JA 18–19, 33, 46, 94. Edgar asked Grado if he had another way of covering the responsibilities; when he confirmed that he did not, Edgar told him that he could require Peters to work. JA 19, 33. Edgar inquired whether Peters had a compelling reason not to work. Grado reported that he had heard that Peters would call in sick if directed to work. JA 19, 32. Edgar stated that such a response would violate BCI policy and that Grado should call Peters himself. JA 19, 57–58. She further directed Grado that unless Peters presented a compelling reason why he could not work on the day in question, Grado should give Peters a specific order to work and should advise Peters that failure to comply with the order would be insubordination that could lead to termination. JA 19, 20, 33.

Grado followed Edgar's directives. When contacted by Grado and told to come to work on Sunday, September 30, Peters responded that he "had plans, and wasn't feeling well all that week." JA 33, 70, 71, 93. As Peters acknowledged, Grado clearly gave him an order, stating "I'm not asking you to come to work, I'm telling you to come to work. If you do not come to work, it could lead to insubordination and could lead to termination." *Id.* Peters also acknowledged that he responded by confirming he would not work, telling Grado, "[D]o what [you've] got to do, and I'll do what [I've] got to do." *Id.* Grado again contacted Edgar, recounting the

conversation.[2] JA 20, 33, 34; 93-95. Significantly, however, Grado did not recommend or request that any disciplinary action be taken. JA 23, 33-34.

Based on his conversation with Peters on Friday, Grado understood that Peters would not be coming in on Sunday. Accordingly, Grado spoke with Katt again on Friday afternoon to make arrangements to cover all the routes on Sunday. JA 34, 97. Because no merchandisers were available, Grado and Katt planned to cover the routes themselves, and they in fact did so. JA 34, 252.

Peters did not report for work on Sunday, September 30, and he did not attempt to contact Grado during the weekend or at any point thereafter to explain his absence. Record at 74 (Appendix A to EEOC Response to Motion for Summary Judgment) (Plaintiff's Statement of Facts "PSOF"), Fact No. 7. Peters did visit a walk-in medical clinic on Saturday, September 29, and was diagnosed with a sinus infection (as evidenced by a note from the doctor he secured after being terminated). JA 292, 293; Record at 74 (PSOF Fact No. 7). Peters called in sick to Katt on Saturday night. Record at 74 (PSOF Fact No. 8). Katt, in turn, unsuccessfully attempted to contact Grado; accordingly, Grado and Edgar were unaware of these facts at the time. JA 21-22, 34, 250, 254. Regardless, based on his conversation with Peters on Friday, Grado already understood that Peters was not coming to work Sunday. JA 34, 70, 71, 93.

4. Pursuant to BCI policy, the Human Resources Department evaluated Peters's conduct to determine what action should be taken. Pedersen, in Albuquerque, reviewed

---

[2] Contrary to the Tenth Circuit's suggestion, Pet. App. 29a, there is no evidence that Grado embellished his account of his conversation with Peters to Edgar by claiming that Peters yelled or reacted angrily.

Peters's personnel file. JA 21, 46. The file revealed that two years earlier Peters had been disciplined for insubordination to a supervisor other than Grado. JA 21, 46. In that incident, Peters had refused to work on a scheduled day off and had become confrontational with the supervisor.[3] JA 46, 60–61. The infraction was serious enough to trigger Peters's suspension and a warning that further insubordination could lead to termination. *Id.* Pedersen relayed this information to Edgar in Phoenix for her to consider in judging how to respond to Peters's actions. JA 21, 46, 82.

During telephone conversations with Pedersen and Grado on Monday, October 1, Edgar reviewed again the events pertaining to Peters's misconduct. JA 21. She confirmed that Peters had not reported to work and had not attempted to contact Grado. JA 21–22, 34. At Edgar's request, Grado checked whether Peters had contacted Katt; learning that he had, Grado immediately reported that fact to Edgar. JA 21–22, 23, 34. Once again, Grado did not request or recommend any disciplinary action, nor did Edgar solicit his views on that question.[4] *Id.*

---

[3] The Tenth Circuit's fact statement includes Peters's self-serving, inflammatory version of this incident (he claims he needed to be absent to be a pallbearer at a friend's funeral). Pet. App. 6a–7a. Peters's explanation of these events, however, is immaterial, as there is no evidence that this prior disciplinary incident was motivated by race discrimination or that Grado or Edgar had any knowledge of the circumstances surrounding the incident, other than what was depicted in Peters's personnel file.

[4] The Tenth Circuit states that "Grado never *officially* recommended that Peters be terminated," suggesting that Grado offered some type of "unofficial" recommendation. Pet. App. 12a (emphasis added). There are no facts to warrant such an inference.

Neither Grado nor Edgar testified as to the specific time on Monday when they received the information that Peters had called in sick to Katt; however, Edgar did testify that she received this information while she was still considering how to address Peters's situation and before she made the final decision to terminate him. JA 21–22, 34. Katt was more specific, testifying that he relayed this information to Grado "around 6 p.m. or something" on Monday.[5] JA 254–55.

The Tenth Circuit concluded that this testimony by Katt created a factual dispute as to whether Edgar found out about Peters calling in sick to Katt before she made the decision to terminate Peters. Pet. App. 28a. BCI does not concede this point. Edgar testified that she made her decision "by the end of the day" Monday. JA 22. Thus, although Katt's testimony supports the conclusion that Edgar learned about Peters calling in sick no earlier than "around 6 p.m." (which would have been "around 5 p.m." for Edgar)[6] on Monday, this conclusion is not inconsistent with Edgar's testimony that she learned this fact prior to making her decision to terminate Peters "by the end of the day" Monday. *Id.*

---

[5] The Tenth Circuit inaccurately states that "[a]ccording to Katt, this exchange took place Monday evening, after Edgar already made her decision to terminate Peters." Pet. App. 8a. It is undisputed that Katt had no knowledge of Edgar's deliberations or the timing of her decision to terminate Peters. JA 320. His testimony on this point speaks solely to his best recollection of when he imparted this information to Grado.

[6] Because Arizona, unlike New Mexico, does not observe Daylight Savings Time, Edgar was an hour behind Grado and Katt on the date in question. *See* 15 U.S.C. § 260a (federal Daylight Savings Time statute); ARIZ. REV. STAT. ANN. § 1-242 (Arizona statute opting out of federal Daylight Savings Time requirements). In 2001, Daylight Savings time was in effect from April 1, 2001 through October 28, 2001. *Cf.* 15 U.S.C. § 260a.

In any event, it is undisputed that on Monday, October 1, Edgar—and Edgar alone—made the decision to terminate Peters's employment for insubordination. *Id.* Edgar ultimately concluded that Peters had engaged in insubordination (his second infraction), which properly subjected him to discharge. JA 22, 80–81. In her judgment, the principal act of insubordination was Peters's response on Friday to Grado's direct order to work during the weekend. JA 20, 22–23, 82. Edgar considered the fact that Peters had subsequently called in sick to Katt, but she concluded that this fact was insufficient to excuse his behavior. In Edgar's view, Peters's failure to report to work on Sunday was not merely an attendance issue but was an extension of his earlier defiant conduct. JA 22–23. Edgar determined that Peters's claimed sickness was also suspect; he had worked on both Friday and Monday, suggesting that, whatever his claimed ailment, he was capable of working during the weekend as well. Edgar also found it suspicious that Peters chose to call in sick to Katt rather than to Grado. *Id.* The EEOC argued to the district court—and BCI does not dispute—that with regard to scheduling issues, including calling in sick, merchandisers customarily dealt with BCI's account managers such as Katt rather than with district sales managers such as Grado. Record at 74 (PSOF Fact Nos. 41, 42). However, Edgar determined that, given the inflammatory content of the exchange between Peters and Grado on Friday, had Peters been truly too sick to work and had he been genuinely interested in preserving his employment relationship with BCI, he would have called Grado directly. JA 23.

In reaching the decision to terminate Peters, Edgar further considered his prior incident of insubordination. His previous conduct mirrored the current situation and, significantly, it had involved a supervisor other than Grado, thus reinforcing the credibility of Grado's description of the more recent

event. JA 21–22, 82. In addition, failing to terminate Peters after a second act of direct insubordination would set a bad precedent. JA 22.

5. On Tuesday, October 2, 2001, at Edgar's instruction, Pedersen and Grado met with Peters and advised him that he was being terminated for insubordination. JA 24, 46–47. They provided him with a written disciplinary notice that specifically referenced his insubordinate comments to Grado. JA 35, 42–43. Before this meeting, neither Pedersen nor Edgar was aware that Peters was African American. JA 24, 47. At no point during the termination meeting or its immediate aftermath did Peters suggest that Grado was biased or that BCI's decision was based on racial animus. JA 49, 67–69. Indeed, prior to this litigation, neither Peters nor any other employee had lodged any complaint with BCI regarding Grado's supposed racial bias. JA 49, 68–69. Peters nonetheless elected to file a charge of discrimination with the EEOC, which subsequently filed this suit.

II. DECISIONS BELOW.

1. The district court granted summary judgment to BCI. Pet. App. 32a–33a, 76a. The court found it indisputable that Peters's admitted conduct was insubordination warranting termination and that Edgar's employment action was not influenced by race (in part because she did not know his race). *Id.* at 58a, 69a–71a. The district court found that, although the EEOC created a dispute of fact over whether Grado was racially biased in a general sense based on claims made about him (for the first time in this litigation) by former BCI employees, the EEOC provided no evidence to establish that Grado's role in the specific termination process at issue was sufficient to render BCI liable for his conduct. *Id.* at 66a–67a, 71a. The court found compelling the fact that BCI had established and followed a neutral, centralized decisionmaking process, pursuant to which Edgar

independently researched and evaluated Peters's conduct and employment history. *Id.* at 64a–67a, 71a. Nor was there substantial evidence that Grado had utilized even his limited discretion to report employee misconduct in a discriminatory manner; rather, he relayed factually accurate information to Edgar. *Id.* at 63a, 75a. The district court found that "[t]he EEOC has not presented evidence that Grado would not have called Edgar if Peters [were] Anglo or Hispanic." *Id.* at 67a. Although the district court noted that Grado did not make an express recommendation that Peters be terminated, it did not base its ruling solely on this fact; rather, the court concluded more generally that the EEOC presented no evidence of a "causal connection between [Grado's] racial bias and his decision to involve Edgar." *Id.* at 68a.

2. Following the EEOC's appeal, the Tenth Circuit reversed. The Tenth Circuit viewed the issue ultimately as one of causation, stating that "the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *Id.* at 20a–21a. In this respect, the court concluded, it makes no difference whether the allegedly biased supervisor made any recommendation or request for the challenged employment decision. *Id.* at 21a–22a. The Tenth Circuit held that, to defeat causation, the employer must show that it independently investigated the facts underlying the employment action. *Id.* at 21a.

Applying this standard, the Tenth Circuit concluded that the EEOC was entitled to a jury trial on its claim. Because Edgar "conducted no independent inquiry into the events that took place" when Grado directed Peters to work, "[i]f the jury concludes that Mr. Grado's report was tainted by race discrimination . . . it could also find that the proffered reason for firing Mr. Peters, which rests entirely on that report, is pretextual." *Id.* at 28a–29a. "The question is not whether

Ms. Edgar *could have* terminated Mr. Peters because of his closing remark alone [to "do what you have to do"], which appears to have been permissible under BCI policy, but what *actually did* cause the adverse employment action." *Id.* at 30a. "Simply pulling the file [of Peters's work history] does not constitute an independent investigation, and a jury could conclude that Mr. Grado's factually disputed report—the sole source of information on which Ms. Edgar relied—caused the termination." *Id.* at 31a.

This Court subsequently granted certiorari.

SUMMARY OF THE ARGUMENT

I. A. Title VII governs the conduct of employers and their agents. Interpretation of the statute is guided in the first instance by principles of agency law, which look to the employee who has "principal responsibility" for the relevant employment decision. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). This responsibility may be practical as well as formal, as when a nominal decisionmaker "rubber stamps" a recommendation or is a "mere cat's paw" of some other subordinate. *Hill v. Lockheed Martin Logistics Mgm't., Inc.*, 354 F.3d 277, 290 (C.A.4 2004) (en banc). A broader theory of liability that attributes to employers the conduct of every employee that could be said to "cause" the employment decision would be boundless in practice, as numerous employees influence the decisions of even moderately large employers, much less large corporations such as BCI.

B. Under this proper construction of the statute, BCI did not violate Title VII. To the contrary, BCI's conduct is a model of equal employment opportunity; BCI could not have done anything more to comply with the statute. It is therefore not plausible that Congress would have intended to punish BCI for purposeful discrimination.

The relevant decision in this case is the determination to terminate Peters for insubordination. BCI vested Edgar with sole responsibility for that decision. In fact, BCI's policies precluded other officials from taking that action. It is undisputed that Edgar was a race-neutral decisionmaker applying race-neutral policies. There is no claim that bias infected the policies that Edgar was charged with implementing. Grado, by contrast, had no decisionmaking authority to discipline Peters for his conduct, much less to terminate him. The Tenth Circuit did not conclude to the contrary.

C. Nor is there a violation of Title VII on the theory that Edgar "rubber stamped" a decision by Grado or merely acted as his "cat's paw." Edgar made her decision independently of influence by Grado such that it is not appropriate to regard Grado as BCI's "agent" for purposes of Peters's termination. Edgar made the determination that Peters had engaged in subordination. Grado did not recommend that conclusion; indeed, he did not suggest it at all, much less recommend or suggest that Edgar terminate Peters. Edgar had no reason to doubt any of the facts presented to her, which she determined established insubordination. Moreover, she reviewed Peters's personnel file, which served at least two roles. The prior documented instance of insubordination added credibility to the events described by Grado. It also guided Edgar's exercise of judgment in deciding whether to terminate Peters.

II. It does not necessarily follow from the foregoing that an employer is never deemed responsible under Title VII for the conduct of a biased subordinate who had a determinative influence upon an employment decision made by a non-biased agent. The relevant inquiry is whether the employer has established an effective policy for reporting allegations of discrimination and has any reason to suspect that animus infected the relevant decision. The employer is not liable if,

despite its best efforts, it has no reason to believe that some other employee without decisionmaking authority has infected the employment decision with racial bias. This understanding of the statute furthers Congress's overriding goal of encouraging the creation of policies that detect and eliminate discrimination in advance, rather than merely remedying discrimination after the fact through litigation.

Such a claim would properly be asserted as one of negligence, *see Ellerth*, 524 U.S. at 759, and, specifically, a claim that the employer was negligent in its management of biased subordinates. The claim would succeed were the plaintiff to demonstrate that the employer knew or should have known of the discriminatory conduct and that conduct was the proximate cause of the adverse employment action. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000); *Ellerth*, 524 U.S. at 759. When an employer institutes effective policies designed to root out animus among even those subordinates who have not been granted decisionmaking authority, it is fair to conclude that Congress would not have intended to deem those subordinates the employer's "agents" whose discriminatory bias may be imputed to the employer.

A. The EEOC cannot demonstrate that BCI failed to establish an effective system for reporting concerns of discrimination or failed to conduct a proper investigation of charges that Grado was biased. Nor has the EEOC alleged that BCI knew or should have known of Grado's purported bias. Rather, the EEOC's theory is merely that BCI is vicariously liable for the conduct of a biased subordinate.

The record refutes any suggestion that BCI violated Title VII. BCI implemented a comprehensive framework for employees to report discrimination in the workplace. Prior to this lawsuit, neither Peters nor any other employee ever raised any concern that Grado was biased. Peters in

particular did not make such an allegation at the time of his termination or within a reasonable period thereafter that would have enabled BCI to evaluate Peters's charges and ensure that the disciplinary process was not influenced by racial animus.

B. Even if the EEOC had alleged a negligence claim and created a factual dispute as to whether BCI should have known of Grado's alleged bias, BCI could not be liable because no evidence exists showing that Grado's conduct caused Peters's termination. The record lacks any material evidence that Grado's decision to report Peters's insubordination was infected by racial bias. The EEOC's assertions to the contrary rest on a small number of post hoc allegations unrelated to this case that are insufficient to overcome summary judgment. The suggestion that Grado might have provided Edgar with inaccurate information neither undercuts the conclusion that Edgar reached an independent judgment nor rests on facts that were material to her decision.

III. A. The Tenth Circuit erred in concluding that its reading of Title VII was required by the agency-law principle that an employer is liable for conduct of an employee that was "aided by" the agency relationship. This view of "aided by" liability is so expansive as to swallow the limitations that Congress intended to impose in restricting Title VII to the conduct of agents rather than of all employees. Indeed, precisely because "aided by" liability had become pervasively misunderstood in this fashion, the Restatement (Third) of Agency eliminates the concept altogether.

B. The Tenth Circuit's contrary legal standard does not promote the underlying purpose of Title VII. In cases such as this, in which an employee without decisionmaking authority is alleged to have influenced the employment decision, the Tenth Circuit imposed too loose a liability standard and too

onerous a burden on employers. This standard does not comport with Title VII's statutory text or its principal purpose of preventing discrimination in advance rather than compensating victims through litigation. The court of appeals held that liability attaches merely upon a showing of a causal relationship between any employee's biased conduct and an employment decision. Such an extraordinarily expansive rule cannot be reconciled with this Court's holding that Title VII embodies Congress's intent to limit, rather than widen, the scope of the employees whose conduct would be attributable to employers.

The Tenth Circuit further held that an employer can defeat liability if a non-biased employee independently investigates the facts underlying the termination decision. But to the extent Title VII ever requires the more extensive investigation envisioned by the Tenth Circuit—a process in which the decisionmaker must conduct factfinding by directly contacting each of the individuals involved in the process—it does so under much narrower circumstances. The court of appeals required such a burdensome inquiry with respect to every employment decision covered by Title VII, which, for large employers such as BCI, could amount to tens or hundreds of thousands of events—such as decisions with respect to promotions, raises, suspensions, and terminations—every year. That burden is so extraordinary that Congress could not have intended to impose it, particularly because it would fail to focus the employer's attention on the particular subset of cases in which there is some genuine reason to suspect animus. Congress instead sought to facilitate the adoption of effective policies under which employers would encourage and investigate reports of discrimination.

C. The Tenth Circuit erred in concluding that its position was necessary to preclude employers from avoiding liability

through "willful blindness" to the biases of their supervisors. Other courts' standards, as well as BCI's standard, accomplish this goal without the adverse consequences imposed by the Tenth Circuit's standard.

D. BCI prevails even under the Tenth Circuit's standard because the record demonstrates that Grado's alleged bias did not taint Edgar's decisionmaking process.

ARGUMENT

Resolution of the question presented requires this Court to revisit the scope of employer liability under Title VII of the Civil Rights Act of 1964, as codified and amended at 42 U.S.C. sections 2000e(b) and 2000e-2(a). As explained below, based upon this Court's interpretations of these sections, the precedential force of which has been enhanced by Congress, *see Faragher v. City of Boca Raton,* 524 U.S. 742, 792 (1998), the answer to the question presented must be as follows: Title VII liability attaches only to the conduct of the employer, including its agents. *See* 42 U.S.C. § 2000e(b). An employer may be liable for the conduct of its agents acting within the scope of their actual authority, or, specifically, when an adverse employment action is taken by its formal decisionmaker with discriminatory animus. *Faragher*, 524 U.S. at 790; RESTATEMENT (THIRD) OF AGENCY §§ 2.04, 7.03(2) (2006). Similarly, an employer may be liable when a biased subordinate possesses sufficient authority or exerts such a level of influence over the formal decisionmaker that she is principally responsible for the decision or is, in effect, the actual decisionmaker behind the adverse employment action. *Hill*, 354 F.3d at 290; RESTATEMENT (THIRD) AGENCY §§ 2.04, 7.03(1)(a).

An employer may also be liable for discriminatory conduct of non-decisionmakers, but only if it is

negligent—when it knew or reasonably should have known of the subordinate's discriminatory animus—and the protected trait was a determinative influence in the adverse employment action. *See Reeves,* 530 U.S. at 141; *Ellerth,* 524 U.S. at 759; RESTATEMENT (THIRD) OF AGENCY §§ 7.03(1), 7.05(1). The causal chain is broken in this situation when the formal decisionmaker separately evaluates the facts or otherwise makes an independent decision. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1248–49 (C.A.11 1998); *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (C.A.7 1990).

Here, the Tenth Circuit's conclusion that BCI could be liable for violating Title VII cannot be reconciled with the statute. BCI's employment policies embody everything that Congress sought to accomplish in Title VII. BCI placed decisionmaking authority exclusively in the hands of a human resources professional who was trained in equal employment issues and unquestionably harbored no racial animus. BCI adopted effective policies mandating that employees report concerns regarding workplace discrimination. No employee, including Peters, ever reported any concerns about Grado. BCI accordingly had no reason to believe, despite its very best efforts, that the decisionmaking process had been corrupted by bias. Given that there is nothing more that BCI could have done to comply with Title VII and to ensure that employment decisions were made on a race-neutral basis, it cannot fairly be said that the company engaged in intentional discrimination.

I. BECAUSE TITLE VII APPLIES TO THE CONDUCT OF EMPLOYEES WITH ACTUAL DECISIONMAKING AUTHORITY, BCI MAY NOT BE LIABLE MERELY BECAUSE GRADO MAY HAVE INFLUENCED PETERS'S TERMINATION.

A. An Employer May Be Liable Where an Agent, with Either Formal Authority or Practical Power to Make a Decision, Takes an Adverse Employment Action Against an Employee on the Basis of a Protected Trait.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee. "[T]he very definition of employer in Title VII, as including 'agent,' expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious." *Faragher*, 524 U.S. at 791–92 (citations omitted); *see Ellerth*, 524 U.S. at 754 (stating that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles"). It is axiomatic that, under the statute, employers may be liable for the actions of their agents under the doctrine of *respondeat superior*, which entails the basic agency principle that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." RESTATEMENT (THIRD) AGENCY § 2.04 (2006); *see id.* §§ 7.03(2), 7.07(1); *see also Ellerth*, 524 U.S. at 755–56 (recognizing Section 219(1) of the Restatement (Second) of Agency (1957)—which is virtually identical to Restatement (Third) of Agency § 2.04—as a "central principle of agency law"). Under this rule, an agent or employee with actual authority to effect a tangible employment decision subjects the employer to liability if she makes the decision

because of the employee's protected trait. Indeed, "there is nothing remarkable" about this "apparently unanimous rule," the basis of which is that, "when a supervisor makes such decisions, he 'merges' with the employer, and his act becomes that of the employer." *Faragher*, 524 U.S. at 790 (citations omitted). Thus, in the typical Title VII vicarious liability case, an employer is accountable for the biased conduct of an agent in whom the employer has vested authority to hire, fire, or take other employment actions. *See, e.g.*, *Ellerth*, 524 U.S. at 762 ("Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. . . . [A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.").

Just as well established, however, is that "Congress's decision to define 'employer' to include any 'agent' of an employer...surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (citing 42 U.S.C. § 2000e(b)); *see Faragher*, 524 U.S. at 792 (recognizing the *Meritor* decision as "establishing the rule that some limitation was intended"). By holding that there are limits to an employer's liability under Title VII, this Court rejected any rule that would "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Meritor*, 477 U.S. at 73; *see Faragher*, 524 U.S. at 792.[7] Vicarious liability does not attach to an employer

---

[7] The EEOC has previously endorsed this position, arguing that "Congress's decision to use the term 'agent,' rather than such words as 'subordinate' or 'supervisory employee,' surely evinces an intent to place

merely because of the discriminatory animus of a supervisor or other employee who has no decisionmaking authority, but whose actions spark an investigation that leads to adverse action against another employee that is otherwise objectively justifiable. Such a position overextends the traditional view of *respondeat superior* liability, and should be rejected.

Certainly, as the Fourth Circuit has held: "the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." *Hill*, 354 F.3d at 288–89 (citing *Reeves*, 530 U.S. at 151–52). As courts addressing this issue universally have recognized, employers should not be permitted to insulate themselves from claims of discrimination by designating formal decisionmakers who are deliberately isolated from employees and thus susceptible to being used as conduits for the racial bias of subordinates. "When a formal decisionmaker acts merely as a cat's paw for or rubber-stamps a decision, report, or recommendation actually made by a subordinate, it is not inconsistent to say that the subordinate is the actual decisionmaker or the one principally responsible for the contested employment action." *Id.* at 290; *see also Llampallas*, 163 F.3d at 1249 ("In a cat's paw situation, the harasser clearly causes the tangible employment action."); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (C.A.5 1996) (stating that if an official decisionmaker "merely 'rubber stamped'" the wishes of others, that decisionmaker would inherit the discriminatory taint); *Shager*,

---

some limits on the acts of employees for which employers under Title VII are to be held responsible." Brief for the United States and the EEOC as Amici Curiae at 16, *Meritor*, 477 U.S. 57 (No. 84-1979).

913 F.2d at 405 ("If [the formal decisionmakers] acted as the conduit of [the employee's] prejudice—his cat's-paw—the innocence of [the decisionmakers] would not spare the company from liability."). Thus, both the *Hill* standard and BCI's proposed standard ensure that actionable discrimination committed by *employers* (as defined by Title VII) is addressed and that the purpose of Title VII is therefore served.

B. The EEOC Cannot Demonstrate That Grado Was the Actual Decisionmaker Responsible For Peters's Termination.

It is undisputed that Edgar was the sole decisionmaker with respect to Peters's termination, and that Grado had no actual authority to terminate employees or even to participate in making such decisions. JA 31, 86–87, 91–92. Nor is there evidence in the record, as there has been in other cases addressing subordinate-bias liability, that Grado had any particular leverage or influence over Edgar, such that he would have been able to impose his will upon her. *See Reeves*, 530 U.S. at 135 (biased subordinate was husband of decisionmaker and wielded "absolute power" within the company); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 221 (C.A.4 2000) (biased subordinate was the son of the employer's CEO who wielded great "informal power" within the company). Indeed, there is no evidence in the record that Grado ever made any attempt to influence Edgar's decision. He did not engage in a lengthy campaign of bringing multiple instances of Peters's deficiencies to the attention of his superiors. *See, e.g.*, *Hill*, 354 F.3d at 283 (allegedly biased safety inspector reporting multiple rules infractions by plaintiff leading to her termination). Nor did Grado make any dramatic gestures, as did the coworker in *Russell* who threatened to quit unless the plaintiff was terminated. *See Russell*, 235 F.3d at 228. He did not "confer" with Edgar about Peters's fate. JA 23, 24. *See Santiago-Ramos v.*

Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (C.A.1 2000) (plaintiff's direct supervisor substantially influencing the termination where he had repeated "daily conference calls" with regional manager regarding plaintiff and was asked for his opinion regarding plaintiff's dismissal). Indeed, it is undisputed that Grado was not asked for his opinion about what should happen to Peters, and he made no recommendations. JA 23, 34. Nor is there any evidence in the record that Grado disparaged Peters during the few, succinct conversations he had with Edgar about the matter.

It is undisputed that Grado's role in these proceedings was actually quite limited. All he did was: (1) ask for help, in advance, from Edgar in handling an employee whom he (correctly) suspected would resist coming in to work on his scheduled day off; and (2) report Peters's subsequent comments and conduct to Edgar over the course of a two-day period, at her request. Moreover, the record is replete with evidence that Edgar did not passively "rubber stamp" a report or recommendation from Grado but, rather, independently evaluated the situation based on her own experience, knowledge of BCI policies, and common sense.[8] For instance, after Edgar learned that Peters had called in sick to Katt, she was not convinced that his claimed ailment legitimately prevented him from working on Sunday. JA 22, 23. She testified that she was suspicious based on the undisputed fact that Peters worked on Friday and then on Monday and was only "too sick to work" on his scheduled day off, and particularly following his unequivocal declaration to Grado that he was not coming in on Sunday. Edgar also found it suspicious that Peters chose to call in sick to Katt

---

[8] BCI respectfully maintains that the Tenth Circuit's assertion that Edgar relied "exclusively" on information provided by Grado in making the decision to terminate Peters, Pet. App. 28a, 30a-31a, is incorrect.

rather than touching base with Grado, given that Grado had warned him Friday he might be terminated if he refused a direct order to come to work. JA 22–23.

Edgar did not confer with Grado this issue or ask his opinion regarding Peters's motivations. Rather, she made her own observations of these undisputed facts and arrived independently at the conclusion that Peters simply had not wanted to work on Sunday and was attempting to dictate the terms of his employment to BCI. JA 22–24. Even if Edgar, an experienced human-resources professional who undoubtedly has dealt with numerous similar factual scenarios, turned out to be wrong about Peters, as the Tenth Circuit summarily concluded, Pet. App. 28a, it would be immaterial.[9] The relevant inquiry is not whether BCI's proffered reasons were "wise, fair or correct" but whether BCI "honestly believed those reasons and acted in good faith upon those beliefs." *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (C.A. 10 1999), *overruled on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *see Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (C.A.7 1997) ("[A]rguing about the accuracy of the employer's assessment [of the plaintiff's performance] is a distraction, because the question is not whether the employer's reasons for a decision are *right* but whether the

---

[9] In concluding that Edgar was "wrong" about Peters, the Tenth Circuit placed undue emphasis on the doctor's note obtained by Peters, *after he was terminated*, accepting this as conclusive proof that Edgar was mistaken about Peters being unable to work on Sunday. JA 293. In any event, the fact that Peters called in sick, or was actually sick, is ultimately immaterial, as he made clear to Grado on Friday he was not coming to work on Sunday, regardless of his health status. After all, even if he had been physically able to work on Sunday, he still had to attend to his "plans." JA 70,71.

employer's description of its reasons is *honest*."(citations omitted)). As the district court recognized, a court must view the matter from Edgar's perspective, examining the facts as they appeared to her, and determine whether she honestly believed her stated reasons, not whether she was "right." Pet. App. 57a–58a.

Not only did Edgar exercise her own judgment, she also took an additional affirmative step to independently investigate the situation, by reviewing Peters's personnel file.[10] JA 21. She found therein an account of a showdown between Peters and his former supervisor that echoed the one relayed by Grado.[11] JA 60–61. The file also revealed that Peters had been given a "final warning," an administrative determination that further instances of insubordination would result in his termination. *Id.* The information in the file corroborated Grado's account, and bolstered Edgar's determination that the correct course of disciplinary action was to terminate Peters.

Based on these undisputed facts, it is simply not reasonable to conclude—as the EEOC has insisted throughout

---

[10] Although the Tenth Circuit suggests that Edgar acted irresponsibly by failing to expand her investigation to ask Peters for his version of the phone conversation with Grado, Pet. App. 28a, it fails to identify what exactly Peters could honestly have told Edgar which would have made any difference whatsoever to her deliberative process. Indeed, even if it were true that Grado was blatantly racist, and even had Peters told Edgar as much during the course of an expanded investigation, this fact would not have made Grado's need for Peters to work on Sunday any less pressing, nor would it have rendered Peters's refusal of a direct order to come to work, by saying "do what you have to do," any less insubordinate.

[11] The Tenth Circuit's depiction of Grado as the sole source of information upon which Edgar based her termination decision also completely ignores Peters's prior history of insubordination, which played a significant role in Edgar's decision to terminate. JA 22.

this case—that Edgar was a mere dupe, or "cat's paw," subject to Grado's racially motivated orchestrations.

II. BCI ALSO FULLY COMPLIED WITH TITLE VII BECAUSE EEOC DOES NOT ALLEGE THAT BCI WAS NEGLIGENT AND DID NOT SHOW THAT GRADO'S CONDUCT CAUSED PETERS'S TERMINATION.

A final avenue for Title VII liability is the agency law principle that an employer is directly liable to "a third party harmed by an agent's conduct when . . . the principal is negligent in selecting, supervising, or otherwise controlling the agent." RESTATEMENT (THIRD) OF AGENCY § 7.03(1)(b); *see also id.* at § 7.05(1). This inquiry, however, remains focused on the "employer." The relevant question is whether biased conduct of a non-decisionmaking employee can be attributed to the employer. That question should be answered by determining whether the employer made sufficient efforts to root out animus in the workplace, including by establishing and enforcing an effective policy for reporting and investigating claims of bias. An employer is not liable under the statute if it has established an effective system for reporting allegations of bias and has no reason to suspect that animus infected the relevant decision.

In defining negligence, the Court has stated that an employer is negligent "when it knew or should have known about the conduct." *Ellerth*, 524 U.S. at 759; *see also id.* at 770 (Thomas, J., dissenting) (stating that "[t]he most that employers can be charged with, therefore, is a duty to act reasonably under the circumstances"). In the subordinate liability context, therefore, an employer (acting through its formal decisionmaker) is negligent when it knew or should have known that the subordinate was biased or it engaged in conduct for discriminatory reasons. This standard presents a reasonable balance between this Court's holding that "absence of notice to an employer does not necessarily insulate that

employer from liability" and its holding that Congress's intent was "to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72.

A finding of negligence on the part of an employer because it knew or should have known of a subordinate's discriminatory animus, however, does not end the liability inquiry. Rather, as with any other tort, it is the plaintiff's burden to prove that the employer's negligence was the proximate cause of the adverse employment action. *See Reeves*, 530 U.S. at 141 (stating that the employee's protected trait must have "had a determinative influence on the outcome"); *Ellerth*, 524 U.S. at 759 (stating that "an employer can be liable . . . where its own negligence is a cause of the harassment"). In other words, a plaintiff relying on this aspect of the standard must show not only that the employer knew or should have known about the bias, but also that the bias translated into some action that caused the adverse employment decision or was otherwise a determinative influence on the outcome. Without limiting the ways that a plaintiff can meet her causation burden, in the context of subordinate-bias liability she must at least produce sufficient evidence to show that the formal decisionmaker failed to separately evaluate the facts or otherwise failed to make an independent decision. *See, e.g., Llampallas*, 163 F.3d at 1249 (stating that causation is not established when the formal decisionmaker "herself evaluat[es] the employee's situation"); *Willis* v. *Marion County Auditor's Office*, 118 F.3d 542, 547 (C.A.7 1997) (stating "it is clear that, when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant"); *Shager*, 913 F.2d at 406 (stating that "there would

be no ground for finding even an innocent violation of the Act" if the decisionmaker "made an independent decision to fire Shager").

This understanding of Title VII furthers Congress's overriding goal of encouraging the creation of policies that detect and eliminate discrimination in advance, rather than encouraging plaintiffs to seek redress in court. Title VII's "primary objective is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806; *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (Title VII's purpose is "a prophylactic one")); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("[T]he language of Title VII . . . makes plain the purpose of Congress to . . . eliminate those discriminatory practices and devices which have fostered racially stratified job environments . . . ."). As this Court has observed:

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.

Ellerth, 524 U.S. at 762 (citations omitted). An interpretation of Title VII that instead shunts the focus to litigation would undermine "the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 524

U.S. at 775. Similarly, "such linkage of liability limitation to effective preventive and corrective measures could serve Title VII's deterrent purpose by encouraging employees to report harassing conduct before it becomes severe or persuasive." *Penn. State Police v. Suders*, 542 U.S. 129, 145 (2004) (citations and quotations omitted).

"Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Kolstad*, 527 U.S. at 545 (citations omitted). Employers contemplating the enactment of new policies would be encouraged by a liability rule rewarding them for their efforts. Tying liability to the existence of such policies would also encourage employers to strengthen current policies to combat discrimination and address employee grievances. Overall, promoting strong and effective grievance procedures complements Title VII's primary purpose of preventing discrimination in advance rather than merely remedying it after the fact. As this Court stated in *Suders*, "[t]ying the liability standard to an employer's effort to install effective grievance procedures would advance Congress' purpose 'to promote conciliation rather than litigation' of Title VII controversies." 542 U.S. at 145 (quoting *Ellerth*, 524 U.S. at 764). Absent effective procedures, "the temptation to litigate would be hard to resist . . . ." *Faragher*, 524 U.S. at 805.

Encouraging employees who believe they have been victims of alleged discrimination to raise their allegations promptly and directly with the employer is also consistent with the general damages principle that a victim has a duty to avoid or minimize damages. *See Faragher*, 524 U.S. at 775. A leading treatise has summarized the rule as follows: "Where one person has committed a tort . . . against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the

damages. The person wronged cannot recover for any item of damage which could thus have been avoided." C. MCCORMICK, LAW OF DAMAGES 127–58 (1935). *Faragher* applied this principle to the employer liability context and explained:

> If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

524 U.S. at 806–07; *see also Ellerth*, 524 U.S. at 764 ("Title VII borrows from tort law the avoidable consequences doctrine."); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982) (explaining the tort doctrine of avoidable consequences).

In situations where the employer takes reasonable measures to root out animus among all employees, including those subordinates who have not been granted decisionmaking authority, it is fair to conclude that Congress would not have intended to deem those subordinates the employer's "agents" and attach to the employer the label of "discrimination." Accordingly, absent sufficient evidence that the employer knew or should have known of the subordinate's bias and that the subordinate's conduct caused the adverse employment action, *see Ellerth*, 524 U.S. at 759; *Reeves*, 530 U.S. at 141, then there is no employer liability under Title VII.

A. The EEOC Cannot Make Out a Claim That BCI Made Insufficient Efforts to Identify and Investigate Claims of Bias by Employees Such as Grado.

The record demonstrates that BCI fully complied with Title VII. BCI adopted and implemented a broad-based employee complaint system for employees to report incidents of discrimination. BCI educated its employees regarding Title VII and other anti-discrimination laws, distributed anti-discrimination policies, and provided avenues for employees to submit complaints of discrimination. JA 24–27. BCI also distributed workplace conduct policies, so that all of its employees would know the rules, and gave trained human resources personnel, such as Edgar, sole authority to make termination decisions in order to ensure that these rules were enforced in a consistent and race-neutral fashion. JA 18, 24–28, 45. The EEOC has presented no evidence demonstrating that BCI's policies were not enforced, or were otherwise ineffective.

Although BCI undertook considerable efforts to ensure that complaints of discrimination could, and would, be brought to the attention of the company, it is undisputed that the preventative mechanisms which BCI put in place were not used in this case to alert the company that it employed a potentially racially biased supervisor. No one—including Peters and the other EEOC affiants who belatedly stepped forward to call Grado a racist—ever made such complaints to BCI prior to Peters's termination. JA 49, 193–201. Nor did Peters take advantage of this system during his termination process or within a reasonable time thereafter. Peters could have avoided the harmful effect of termination by promptly raising his complaint of supervisor discrimination with BCI at any point prior to termination or at a reasonable point thereafter. He did not do so. Rather, he elected to raise his allegations only through the Title VII process in the first

instance. Such behavior does not "effect Congress' intention to promote conciliation rather than litigation . . . ." *Ellerth*, 524 U.S. at 742. Moreover, given Peters's failure to alert BCI to the possibility of race discrimination, it unreasonable to expect BCI to have divined some hidden discriminatory intent on the part of Grado.

B. Grado's Conduct Did Not Cause Peters's Termination.

Even if there were an issue of disputed fact as to whether BCI failed to establish anti-discrimination policies or appropriate reporting mechanisms or that it otherwise should have known of Grado's alleged bias, BCI is not liable under Title VII because there is no evidence that Grado's supposed racial bias translated into any action which had a determinative influence on Edgar's decision.

The district court correctly found that there was no evidence of selective reporting by Grado nor any indication that Grado passed along misleading or incomplete information. *See* Pet. App. 63a (stating that "[t]here was no evidence . . . either before Edgar or before this Court, to raise the inference that Grado relayed misleading information to Edgar). To the contrary, the evidence is that Peters engaged in the conduct that BCI attributes to him." Any racial animus notwithstanding, Grado did nothing more than tell Edgar the truth. The Tenth Circuit agreed that Peters's statements to Grado during the course of their conversation on September 28, 2001, as accurately relayed by Grado, "could only be interpreted as defiance," but insisted that Grado also reported "several additional facts" about his conversation with Peters that tainted Edgar's perception of events. Pet. App. 29a. These additional "facts," however, are nothing more than minor, immaterial discrepancies that do not create a dispute as to whether Grado accurately depicted Peters's undeniably insubordinate conduct to Edgar.

First, Grado did tell Edgar that he understood that Peters was "planning to call in sick," based on what Katt told him, whereas Peters denies saying this to Katt. JA 107. It is undisputed, however, that Katt told Grado that Peters would likely resist coming to work on Sunday. JA 100–01. The difference between these two versions of Peters's behavior, and the likely impact of one version versus the other on Edgar's perception of the situation, can only be viewed as *de minimis*, particularly in light of the fact that Peters ultimately refused to come to work on Sunday in defiance of Grado's direct order. Moreover, Peters admitted that he told Grado, on Friday, that he could not come to work Sunday in part because he "was not feeling well," which of course amounted to Peters calling in sick two days in advance, in contradiction of company policy. JA 70–71. The fact that he called in sick (again) to Katt within a proper timeframe does not change the fact that he had already unequivocally told Grado he was not coming to work. Edgar could hardly have been improperly influenced by being presented with speculation regarding Peters's conduct, which, even if unfounded at the time, turned out to be true.

Likewise, the parties' disagreement as to whether Peters responded to Grado's inquiries by telling Grado that his plans were "none of [his] business" is also immaterial. It is undisputed that Peters told Grado that he could not come to work on Sunday in part because he had "plans" and that Peters offered no explanation to Grado as to the nature of his "plans," even when told he might be terminated for insubordination. JA 70, 71. There is no evidence that Grado cut off an attempt by Peters to provide such an explanation—rather, Peters testified that he was the one who ended the conversation. JA 71, 105. Thus, the differences in the parties' versions of what Edgar was given to understand regarding Grado's attempts to probe Peters about his "plans"

are *de minimis* and immaterial in light of Peters's other undisputed insubordinate statements (as accurately conveyed by Grado) during the course of the conversation. Finally, there is no dispute that Grado accurately told Edgar, in response to her inquiries on Monday, that Peters did not come to work on Sunday and that Peters made no attempt to contact him over the weekend.[12] It is also undisputed that Grado told Edgar that Peters had called in sick to Katt. JA 21–22, 34.

The Tenth Circuit made much of the supposed dispute over whether Grado told Edgar about Peters calling in sick to Katt before she made the decision to terminate Peters. Even if there were a bona fide dispute on this issue (which BCI denies), and even supposing Edgar were mistaken (or lying) and she did not receive this information until after she made her decision to terminate Peters, such supposition would in no way be relevant to the only matter at issue; namely, whether Grado's alleged racial bias tainted Edgar's decisionmaking process. There is no evidence in the record that Grado knew Peters had called in sick to Katt prior to learning this fact from Katt, nor is there any evidence that he concealed this information or delayed reporting this information to Edgar after receiving it. In other words, it is undisputed that Grado, the only source of alleged racial bias in this case, acted blamelessly with respect to this issue, reporting this news to

---

[12] The Tenth Circuit noted that Katt testified that he paged Grado several times to notify him that Peters had called in sick, but Grado "for some reason" failed to return the pages, Pet. App. 6a, once again improperly drawing a negative inference from a totally immaterial fact. There is absolutely no evidence in the record that Grado's failure to return Katt's page was caused by a discriminatory motive or had anything to do with Peters. Indeed, Katt testified that it was not uncommon for Grado not to return his pages on a weekend. JA 96.

Edgar as soon as he received it, and at whatever point that fell in Edgar's decisionmaking process.

In addition, Edgar testified that Peters's call to Katt on Saturday night had no impact whatsoever on her assessment of Peters's conduct or her termination decision. JA 22–23. Thus, whether she learned this fact before or after her termination decision is immaterial. Indeed, she was certainly free to revisit her termination decision after receiving this information from Grado, but (still unaware of his race) she chose not to do so.[13]

Furthermore, there is no evidence that Grado's conduct was infected by his supposed racial bias. There is no evidence that Grado's decision to ask Peters to work or to contact Edgar for help in dealing with Peters regarding this issue was attributable to racial bias. There is no dispute that Grado was in a dire situation with respect to route coverage on Friday, September 28, 2001—even the Tenth Circuit referred to Grado's problem as a "serious scheduling crunch." Pet. App.

---

[13] In determining that BCI's stated reasons for terminating Peters could be deemed pretextual, the Tenth Circuit focused on yet another factual red herring by repeating Peters's allegations that, at his termination meeting on Tuesday, October 2, 2001, "the key players in the decision fell silent upon hearing that Peters's absence was excused, suggesting that they were indeed surprised by the news." Pet. App. 28a. This statement is immaterial and, upon close examination, completely illogical. The only individuals in attendance at the termination meeting were Peters, Grado, Pedersen, and another manager. Edgar did not attend. The Tenth Circuit found that both Grado and Edgar learned about Peters calling in sick from Katt on Monday evening. Pet. App. 7a–8a. Thus, neither Grado nor Edgar (had she attended the termination meeting) would have been "surprised" to hear this same news from Peters on Tuesday morning. Nor is it relevant (much less probative of pretext) as to whether the other attendees were "surprised" by the news, since it is undisputed that they did not take part in the termination decision.

3a. All but one of the merchandisers under Grado, most of them white or Hispanic, worked overtime during the week in question, and many worked more hours than Peters. JA 38–41. That Grado called upon Peters as a last resort in the face of real need is borne out by the undisputed fact that, when Peters refused to come in, Grado ended up covering the routes himself. JA 34, 252.

Nor does any evidence suggest that Grado contacted Human Resources because Peters was African-American. Although the EEOC presented evidence of other employees who arguably received more lenient treatment from Grado, these examples were not comparable because they did not involve multiple acts of insubordinate refusal to obey a direct order,[14] *see* Record at 74, PSOF Fact Nos. 10, 18, 46, 48, and the district court correctly concluded that these individuals were not "similarly situated" to Peters. Pet. App. 73a–75a.

Moreover, the contention that Grado was more lenient in reporting the offenses of Hispanic employees,[15] even if true,

---

[14] For instance, there is evidence that an Hispanic merchandiser told Katt that she would come in to work on her day off, but did not show up, and that another Hispanic merchandiser failed to return Grado's page despite being ordered to do so, due to the fact he had voluntarily abandoned his job, unbeknownst to Grado. As the Tenth Circuit acknowledged, however, there are significant factual differences among these scenarios. Pet. App. 25a. Neither of these employees responded to a direct order from Grado by telling him to "do what he had to do," nor did Grado face an imminent coverage issue during the time periods in question or have any other pressing reason (as he did with Peters) to get Human Resources involved in the situation. JA 35-36.

[15] The Fourth Circuit has stated, compellingly, that an employer should not be denied summary judgment when a biased subordinate brings an employee's undisputed infractions to light, even though "the violations

is irrelevant, as it misconstrues the undisputed purpose and nature of Grado's communications with Human Resources regarding Peters. Grado did not initiate communications with Edgar on Friday, September 28 for the purpose of "reporting" that Peters had been insubordinate. Rather, it is undisputed that Grado spoke to Edgar *before* he ever talked to Peters, for the purposes of seeking advice on whether he could require Peters to come to work, and how to frame his communications with Peters on this issue. JA 18–19, 33. Nor is there any evidence in the record to suggest that Grado made an unwarranted, racially biased assumption that Peters would resist coming to work or that Grado simply fabricated a speculation that Peters would resist coming to work in order to paint Peters in a negative light to Edgar. Rather, it is undisputed that Katt told Grado Friday afternoon that Peters would likely resist coming to work. JA 100–01. And, of course, Peters *did* resist coming to work. In short, as the district court recognized, there is no evidence in the record to suggest that, notwithstanding his supposed racial bias, Grado acted inappropriately in obtaining help from Human Resources in dealing with Peters, or handled the situation with Peters differently than he would have with any other employee under similar circumstances. *See* Pet. App. 67a.

---

might not have been known in the absence of a subordinate's discriminatory animus . . . ." *Hill*, 354 F.3d at 296. Otherwise, an unbiased employer could never discipline an employee for undisputed violations of company rules, including egregious acts such as fighting and stealing, "so long as the employee could demonstrate that she was 'turned in' by a subordinate employee 'because of' a discriminatory motivation." *Id.*

III. THE TENTH CIRCUIT'S MORE EXPANSIVE THEORY OF LIABILITY LACKS MERIT.

A. The Tenth Circuit's Decision Misapplies Supreme Court Precedent to Expand an Employer's Vicarious Liability Beyond the Bounds Necessary to Serve the Purposes of Title VII.

The Tenth Circuit derived its view of an employer's vicarious liability for the actions of non-decisionmakers from the provision of the Restatement (Second) of Agency which provides that an employer will be held vicariously liable for the actions of a servant where the servant is "aided in accomplishing the tort by the existence of the agency relation." Pet. App. 16a (citing *Ellerth*, 524 U.S. at 758 (quoting Restatement (Second) of Agency § 219(2)(d) (1957))). The court of appeals, however, dramatically overread the "aided-in" theory of agency.

Under the Restatement (Second) of Agency, a "master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957). The comments to this subsection illustrate that this theory of liability was limited to situations involving misrepresentation or deceit. *Id.*, cmt. e. Indeed, "[a]lthough technically separate from apparent authority, the aided-by-agency-relation basis for vicarious liability was intended to apply to similar cases—those involving deceit or misrepresentation, which involve reliance by the plaintiff on the agency relationship." Daniel M. Combs, Casenote, Costos v. Coconut Island Corp.: *Creating a Vicarious Liability Catchall Under the Aided-By-Agency-Relation Theory*, 73 U. COLO. L. REV. 1099, 1104 (2002) (citing

WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY 162 (1964)). In short, "[a]n analysis of the text and drafting history of section 219(2)(d) indicates that despite its open-ended language, the aided-by-agency relation basis for vicarious liability properly applies only in cases involving reliance and deceit." *Id.* at 1103; *see also Ellerth*, 524 U.S. at 772 (Thomas, J., dissenting) (stating that, "as demonstrated by the Restatement's illustrations, liability under § 219(2)(d) depends upon the plaintiff's belief that the agent acted in the ordinary course of business or within the scope of his apparent authority"); *Mahar v. StoneWood Transp.*, 2003 ME 63, 823 A.2d 540 (Me. 2003).

Application of the aided-in-agency prong of section 219(2)(d) without requiring the existence of apparent authority, and thus reliance by the plaintiff, "would make the scope of employment requirement largely superfluous because in almost every case where the tort is within the scope of employment the tortfeasor will have been aided in commission of the tort by the agency relationship." Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 550 (2002). In *Ellerth*, this Court recognized this problem, stating that, "[w]ere this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment." 524 U.S. at 760. While therefore applying this doctrine in a limited circumstance, this Court "hesitate[d] to render a definitive explanation of [the Court's] understanding of the standard in an area where other important considerations must affect [the Court's] judgment"—namely, "that agency principles constrain the imposition of vicarious liability." *Id.* at 763.

Indeed, the "aided-in" language of the Second Restatement has been so widely misconstrued by the courts

that the Third Restatement has simply abandoned it. While in 1998 the doctrine of "aided-in-agency" vicarious liability was a "developing feature of agency law," *Ellerth*, 524 U.S. at 763, the Restatement (Third) of Agency has now reversed that development. The drafters of the Restatement (Third) recognized that "[i]nterpreting 'aided in accomplishing the tort by the existence of the agency relation' beyond situations in which an employee purports to speak or transact on behalf of the employer has the potential to expand an employer's vicarious liability well beyond the established boundaries of the scope-of-employment test." RESTATEMENT (THIRD) OF AGENCY § 7.08, Rptrs. Note b. Because of the fear of improperly expanding liability, "[t]his Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability." *Id.* cmt. b. Instead, "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents." *Id.* § 7.08, cmt. b (citing Restatement (Third) of Agency § 7.05, which imposes liability on a principal for its negligence).

As the revisions to the Restatement evince, the Tenth Circuit's use of a broad "aided-in-agency" theory is misplaced. The Tenth Circuit should have relied, not on the Restatement provision cited in *Ellerth*, but on *Ellerth* itself, which disclaimed any intention of incorporating the Second Restatement into Title VII law. *Ellerth* recognized at the outset of its analysis that the "aided-in-agency" principle could not apply in every case that came within the literal terms of the Restatement provision, for to do so would make the employer liable for every act of co-worker harassment, a result the Court dismissed out of hand. *Ellerth*, 542 U.S. at 760. *Ellerth* simply held that an employer is vicariously

liable for the actions of its employees who have the actual power to make decisions (with the caveat that an employer that creates an effective grievance procedure may avoid even some of this liability). In doing so, it noted that as applied in the Title VII context, the law of agency should be moderated where useful to serve to purposes of the statute. *Id.* at 763. In particular, *Ellerth* noted that "Title VII is designed to encourage the creation of antiharrassment policies and effective grievance mechanisms." *Id.* at 764. "Were employer liability to depend in part on an employer's effort to create such procedures," the Court found, "it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures." *Id.* (citations omitted).

Neither *Ellerth* nor the purposes of Title VII suggest that vicarious liability should be imposed here. Grado undisputedly did not have actual decisionmaking authority. If Grado's reporting of Peters to Edgar was motivated by discriminatory intent, that reporting can fairly be said to have been "aided by" his job responsibilities. But the report is not the focus of the complaint or of the Title VII inquiry. The allegedly unlawful action is the termination decision, and that decision was made by Edgar, not Grado. Under *Ellerth*, it is only Edgar, the decisionmaker, who acts on behalf of the company and who could subject it to liability.

B. The Tenth Circuit's Standard of Liability Overburdens Employers.

The Tenth Circuit did not fundamentally misunderstand the basic approach to subordinate bias liability. At one end of the spectrum of liability, the court of appeals correctly recognized that employers should be liable when decisionmakers "rubber stamp" decisions of biased subordinates. At the opposite end, the Tenth Circuit also

correctly recognized that employers should not necessarily be held liable when the plaintiff's allegation is merely that one link in the chain of decisionmaking was tainted by bias. But the Tenth Circuit erred by adopting a standard that is not attentive to the limits on the range of employees whose conduct will be attributable to employers and by imposing too onerous a burden that does not comport with the principal purpose of Title VII to prevent discrimination in the first instance rather than compensating victims through litigation.

The Tenth Circuit adopted a vicarious liability standard that looks merely to causation. The court held that employers are liable under Title VII when "the actions of [a] biased subordinate caused the employment action." Pet. App. 21a. In support of its view that causation was the relevant standard, the court cited *Ellerth*'s assertion that Title VII "'accommodate[s] the agency principle of vicarious liability for harm *caused by* misuse of supervisory authority.'" Pet. App. 19a (emphasis in original) But the supervisor in *Ellerth* was the actual decisionmaker and this Court merely indicated that when the decisionmaker misuses her authority and thereby causes harm, the company should be vicariously liable. *Ellerth* did not adopt the far broader holding that a sufficient agency relationship for purposes of Title VII arises whenever an employee "causes" harm. Indeed, as noted *supra*, *Ellerth* explicity rejected that proposition when it noted that too broad a reading of agency law would impose vicarious liability on employers for co-worker harassment. The Tenth Circuit's standard renders an employer liable for the conduct of a virtually boundless body of employees, directly contrary to this Court's insistence that Congress instead intended to place limits on the classes of employees who would be deemed agents for purposes of Title VII.

The Tenth Circuit separately held that the causal relationship could be defeated by an independent investigation

of the facts giving rise to the employment decision by a non-biased employee. The Tenth Circuit required that inquiry with respect to *every* employment decision covered by the statute, including promotions, raises, suspensions, and terminations. It is fair to assume that several of these decisions will likely be made with respect to each employee during the course of each year. And for large corporations, with tens or hundreds of thousands of events each year, the burden would be potentially crushing. That burden is so extraordinary that Congress could not have intended to impose it. Congress instead sought to facilitate the adoption of effective policies under which employers would encourage reporting and investigate reports of concerns of racial and gender bias. *Kolstad*, 527 U.S. at 545; *Faragher*, 524 U.S. at 806; *Ellerth*, 524 U.S. at 764.

The standard for subordinate-bias liability as articulated and applied by the Tenth Circuit particularly places an undue burden on human resources personnel and others charged with investigating allegations of employee wrongdoing. In effect, the Tenth Circuit standard requires investigators such as Edgar to assume that an unlawful motive lurks behind every report or complaint of employee misconduct, and, essentially, compels the performance of multiple investigations into the motives of each witness within the scope of the overarching investigation of the claim of misconduct. The Tenth Circuit also, in effect, requires a decisionmaker to always elicit the accused employee's "side of the story" prior to taking disciplinary action. Pet. App. 21a, 28a, 31a. Speaking directly with the accused employee is certainly a desirable and appropriate step in many, perhaps most, investigations of claims of workplace misconduct. There are situations, however, such as presented in the case at bar, where such a step is unnecessary. The choice of the method by which to investigate a particular claim of workplace misconduct is best

left to the discretion of the individuals who are assessing the circumstances of each complaint, rather than to courts acting as "super personnel departments," picking apart investigations months and years after the fact.[16]

Furthermore, a standard that sets a minimum requirement for an ideally comprehensive investigation ignores the realities of day-to-day human resources administration. Human resources personnel such as Edgar, whose area of responsibility included well over a thousand employees, JA 24, cannot reasonably be expected to perform the same level of investigation for each complaint. They must prioritize and use their judgment to determine how much time and attention to devote to each complaint. For instance, complaints involving allegations of race discrimination, sexual harassment, or "whistle blowing" on corporate misconduct obviously merit a more comprehensive investigation than a complaint about an employee who does not want to come to work on his scheduled day off. The imposition of uniform requirements for each investigation will have the opposite of its intended effect—backlogging investigations and delaying resolution of complaints touching on important issues, including issues implicating Title VII and other anti-discrimination laws.

Companies such as BCI expend considerable resources developing non-discriminatory policies and hiring and training

---

[16] It is well settled that courts may not act as a "super personnel departments" that second-guess employers' business judgments. *See, e.g., Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 628 (C.A.6 2006); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (C.A.8 2006); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1197 (C.A.10 2006); *Holcomb v. Powell*, 433 F.3d 889, 897 (C.A.D.C. 2006); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (C.A.7 2002), *cert. denied*, 537 U.S. 884 (2002).

personnel exclusively dedicated to conducting workplace investigations and to consistently enforcing such policies. For smaller companies, the expense of maintaining centralized decisionmaking and investigative functions is likely proportionally even more burdensome. If liability may be premised upon the discriminatory motive of a non-decisionmaking individual who merely invokes a centralized investigative process, provides information, or plays any role whatsoever in a workplace investigation where he or she may be deemed to have influenced the decision, the incentive for employers to implement, as a preventative measure, a centralized decisionmaking process is greatly reduced. For example, an employer may question why it should continue to retain and entrust decisions to a neutral investigator if it will be held liable based on the discriminatory motive of a subordinate employee. In essence, the human resources professional—the one with the most training in anti-discrimination policies—becomes an unnecessary component in the workplace. Conversely, the standard proposed by BCI, which correctly places the focus on the discriminatory animus of true decisionmakers and agents of the company, encourages employers to develop dedicated human resources functions and to provide additional support and resources to their current human resources personnel.

C. The Tenth Circuit's Standard Is Not Necessary to Prevent Employers from Remaining Willfully Blind to the Discriminatory Actions of Their Subordinates.

The Tenth Circuit incorrectly concluded that its position was necessary to preclude employers from avoiding liability through "willful blindness" to the biases of supervisors. Pet. App. 18a. Other courts—applying different standards—have universally recognized that employers should not be permitted to insulate themselves from claims of discrimination by designating formal decisionmakers who are deliberately

isolated from employees and thus susceptible to being used as conduits for the racial bias of subordinates. *See Hill*, 354 F.3d at 290–91 (stating that "[s]uch a construction of those discrimination statutes would thwart the very purposes of the acts") (citing *Reeves*, 530 U.S. at 151–52).

BCI's proposed standard likewise does not permit such a result. Rather, BCI's standard permits a finding of liability in a case where an employer should have known about a subordinate's bias, even if the actual decisionmaker were wholly ignorant of any unlawful motive. In addition, BCI's proposed standard accords with the views of all courts that have addressed this issue, in that it ensures that employers will be held accountable in the true "rubber stamp" or "cat's paw" scenario—that is, a case where the biased subordinate exerts a level of influence, with no independent evaluation by the formal decisionmaker, such that the subordinate becomes the actual decisionmaker. The Tenth Circuit's causation standard therefore, is not necessary to accomplish this goal.

D. BCI Prevails Even Under the Tenth Circuit's Expansive Standard Because the Record Does Not Suggest That Edgar's Decisionmaking Process Was Tainted by Discrimination.

For the reasons set forth in Section II(B), *supra*, BCI prevails even under the Tenth Circuit's standard, for the summary judgment record demonstrates that Grado's alleged bias did not taint Edgar's decisionmaking process. Although the Tenth Circuit suggested that "[a] biased low-level supervisor with no disciplinary authority might," under any stricter rule than the one it adopted, "effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker," Pet. App. 18a, there is simply no suggestion that any such taint impacted Edgar's decision. Peters came to

the attention of the BCI Human Resources Department because a BCI manager desperately needed him to come to work. Human Resources remained involved in the situation because Peters refused to come to work, defying a direct order of his supervisor.

BCI's designated agent, Edgar, assessed the situation based on her experience and training and applied BCI's written policies without regard to Peters's race. The undisputed evidence demonstrates that Edgar utilized a race-neutral process in making a legitimate business decision. Congress did not intend for employer liability under Title VII to include this situation; rather, it intended to promote this process.

CONCLUSION

For the foregoing reasons, the Tenth Circuit's decision should be reversed with instructions to affirm the district court's decision awarding summary judgment in favor of BCI.

Respectfully submitted,

ERIC TODD PRESNELL
Counsel of Record
KARA E. SHEA
T. HAROLD PINKLEY
DAVID L. JOHNSON
MILLER & MARTIN PLLC
1200 ONE NASHVILLE PLACE
150 FOURTH AVENUE NORTH
NASHVILLE, TENNESSEE 37219
615-244-9270

THOMAS C. GOLDSTEIN
AKIN GUMP STRAUSS HAUER
& FELD LLP
ROBERT S. STRAUSS BUILDING
1333 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, D.C. 20036
202-887-4060